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No. 82-1401

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IAIN CALDER AND JOHN SOUTH,
Appellants,

v.

SHIRLEY JONES,
Appellee.

On Appeal from the California Court of Appeal, Second Appellate District

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE FOR THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS; ADVANCE PUBLICATIONS, INC.; AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION; AMERICAN SOCIETY OF NEWSPAPER EDITORS; ASSOCIATED PRESS; ASSOCIATED PRESS MANAGING EDITORS; DOW JONES & COMPANY, INC.; THE HEARST NEWSPAPER CORPORATION; THE LOS ANGELES TIMES; THE MIAMI HERALD PUBLISHING COMPANY; NATIONAL ASSOCIATION OF BROADCASTERS; NATIONAL NEWSPAPER ASSOCIATION; BOARD OF GOVERNORS OF THE NATIONAL PRESS CLUB; THE NEW YORK TIMES COMPANY; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; SOCIETY OF PROFESSIONAL JOURNALISTS, SIGMA DELTA CHI; THE WASHINGTON POST; AND THE WASHINGTON PRESS CLUB.

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MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, *ET AL.*, FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF APPELLANTS' BRIEF ON THE MERITS

The Reporters Committee for Freedom of the Press, *et al.*, hereby move this Court for leave to file a brief as *amici curiae* in support of the appellants' Brief on the Merits in this case. The consent of the appellants has been obtained. App. A. Appellees have refused to consent to the filing of this *amici* brief. App. B.

The movants asking for leave to file this brief represent organizations and individuals engaged in the gathering and dissemination of news reports concerning matters of public interest. They believe their ability to serve the public in this capacity will be greatly encumbered by the decision below.

Movants believe that their brief *amici curiae* will aid this Court by (1) clarifying the far-reaching ramifications of the California Court of Appeal decision, (2) describing how the decision below, if affirmed, will be detrimental to the ability of reporters and editors to fulfill their goal of informing the public, (3) elucidating why the decision below is inconsistent with jurisdictional principles established by this Court and is in conflict with other state and federal court rulings and (4) explaining why First Amendment protections should be considered in determining whether to allow a distant state to impose personal jurisdiction over a reporter or editor.

Accordingly, movants respectfully request this Court to grant leave to file the accompanying Joint Brief for *Amici Curiae* in support of appellants' Brief on the Merits.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

This brief *amici curiae* is filed in support of appellants, Iain Calder and John South. It is accompanied by the written consent of appellants (App. A), the appellee's refusal (App. B) and a Motion for Leave to File a Joint Brief for *Amici Curiae*.

These *amici curiae* are national organizations that together represent a broad spectrum of working journalists, newspapers, broadcast stations and networks and others involved in the gathering and dissemination of news to the public. *Amici* include both large and small news organizations. They view the California Court of Appeal's decision as a threat to the free dissemination of news and public affairs information to the American public.

This case does not involve the imposition of jurisdiction under California's "long-arm" statute on the publisher of a national newspaper. Instead, it squarely presents the question of whether a reporter or editor who has had occasional but sporadic contacts with a distant state while performing news gathering or editing activities is subject to personal jurisdiction. Such a holding would require defending a defamation action in a state hundreds or thousands of miles from where the journalist lives and works. Further, this Court is asked to determine if a journalist will face the prospect of being "haled" into court in various foreign jurisdictions as a result of attempting to gather as much information for a story as possible, including from out-of-state sources.

Affirming the decision below will affect reporters and editors working for large and small print and broadcast media. They may hesitate before preparing stories involving information sources in states far from those in which they live and work. They may choose to rely on information gathered locally or decide not to report certain stories at all. Journalists employed by large news organizations are vulnerable because they often report on

national events. When key editorial personnel are forced to appear in distant states the normal operations of even major media organizations are affected adversely. Although some smaller media do not often deal with stories outside of their states of publication, when they do they may feel the impact of "long-arm" jurisdiction more severely than the larger media. The loss of a journalist who spends months defending a defamation suit in a distant state may cause sufficient editorial disruption and financial drain that the publication or station is forced out of business.

It is for these reasons, as explained further below, that *amici* express their views to this Court. *Amici* believe that if journalists are subject to personal jurisdiction in distant states as the result of occasional news gathering activities, the flow of news and information to the public will be significantly impeded.

Affirming the decision of the court below will have a deleterious effect on news and information dissemination. Journalists are aware of the rising number of defamation suits filed each year. In light of this, a holding that their news gathering activities subject them to being "haled" into distant courts will inhibit journalists on large and small media alike from engaging in the robust reporting this Court long has fostered.

STATEMENT OF FACTS

Amici adopt the appellants' statement of the facts and summarize it as follows:

Appellee, a professional entertainer and resident of California, with her husband, Mr. Marty Ingels, brought this action for libel and related torts against the National Enquirer, Inc., and the two appellants, Iain Calder and John South. The claim was based on an article appearing in the *National Enquirer*'s October 9, 1979, issue which stated that appellee's husband "has terrorized his staff,

cheated stars, outraged advertisers and scandalized Hollywood," and that appellee has been "driven to drink by [her husband's] bizarre behavior." J.A. 11.[1]

The plaintiffs sought general damages of $10 million and punitive damages of $10 million. After maintaining that the article was untrue, appellee's husband filed a request for dismissal of his complaint on the morning of his deposition. Appellee has continued to pursue the litigation on her own behalf.[2]

Appellant Calder is employed as editor and president of the *Enquirer*. Appellant South is employed by the *Enquirer* as a reporter. South's byline appeared on the article in question.

Both appellants were served with process by mail in Florida. They caused special appearances to be entered on their behalf and moved to quash service of process, challenging the constitutionality under the First and Fourteenth Amendments of the application to them of the California "long-arm" statute.[3]

The undisputed evidence before the trial court showed that Calder and South reside and have their offices in Florida. They never have had an office or place of business in California, nor conducted business, owned property, obtained credit or had bank accounts there. Calder

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[1] J.A. refers to the Joint Appendix.

[2] On May 31, 1983, this Court entered an order dismissing as moot the appeal as to appellee's husband. Appellee has continued to demand damages of $20 million.

[3] California Code of Civil Procedure § 410.10 provides:

> "A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States."

The *Enquirer*, a Florida corporation with principal place of business in Florida, and its Los Angeles distributing company did not contest the California court's jurisdiction and answered the complaint.

did not visit or telephone to California in connection with the story in question. He did not participate in the investigation for or preparation of the article. He only performed routine editorial services regarding the article, and these took place at his Florida office. All of South's services in connection with the article took place at his Florida office. There he made a few long-distance telephone calls to California in connection with research for the article as well as a call to Ingels to read him the article before publication to invite his comment.

After weighing "First Amendment considerations . . . in the balance of fundamental fairness," J.A. 96, the trial court granted appellants' motion to quash service. The California Court of Appeal reversed, contending that "a special First Amendment test," J.A. 110, cannot be applied to the jurisdictional question. The court found jurisdiction over Calder and South proper because the complaint alleged an intentional tort, i.e., that appellants "committed [an act] outside the forum state with the intent to cause a tortious effect within the state." J.A. 115. Alternatively, jurisdiction over South was upheld on the basis of his telephone call to Ingels which "constituted the doing of a significant act in California." J.A. 116.

SUMMARY OF ARGUMENT

The decision of the California Court of Appeal should be reversed on the basis of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and its progeny. In *International Shoe*, this Court held that a state may exert personal jurisdiction over a non-resident only if there exist certain "minimum contacts" between the defendant and the forum so that "traditional notions of fair play and substantial justice" are not offended. Later cases establish that it must be "reasonable" to hold a defendant subject to a distant state's jurisdiction.

Editor Calder had no contact at all with California and reporter South only placed a few telephone calls to the state. These are insufficient contacts to allow California to impose jurisdiction.

Additionally, contrary to the position taken by the court below, it has been found that mere authorship of an article which is circulated by a publication cannot provide a constitutional basis for "long-arm" jurisdiction.

Nor can appellants' alleged "intent" to cause a tortious injury be a sufficient basis, as held by the court below. If "intent" is construed to mean intent to perform the act which causes the harm, there would never be a bar to imposition of "long-arm" jurisdiction since all reporters and editors "intend" to write or edit articles. If "intent" is held to mean the intent to cause the harm resulting from the act, intent or fault would have to be presumed to justify jurisdiction. This Court has held such a presumption may not be made in the context of a defamation action. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974). Thus, "intent" should never be a criterion, and a finding of personal jurisdiction must be based on additional elements to meet due process requirements.

On the other hand, if the appellants' few contacts with California would be considered sufficient, the First Amendment's protection of the press precludes imposing jurisdiction over appellants. Numerous courts have held that the First Amendment is a factor that must be considered in determining whether "long-arm" jurisdiction is proper in defamation actions brought against the media. Such a rule applied in the instant case will make clear that the danger created in exposing appellants to potential liability far outweighs California's incidental interest in asserting jurisdiction. Journalists should not be forced to decide whether or not to write controversial stories based on the threat of suits in a distant state.

ARGUMENT

I. APPELLANTS HAD INSUFFICIENT CONTACTS WITH THE FORUM STATE TO SATISFY DUE PROCESS REQUIREMENTS FOR ALLOWING IMPOSITION OF IN PERSONAM JURISDICTION

A. Due Process Requires Sufficient Contacts with the Forum So That Imposition of Jurisdiction "Does Not Offend Traditional Notions of Fair Play and Substantial Justice"

The due process clause of the Fourteenth Amendment limits the power of a state court to obtain *in personam* jurisdiction over a non-resident. *Pennoyer v. Neff*, 95 U.S. 714, 722 (1878). This Court has held that such personal jurisdiction may be exercised only if there exist certain "minimum contacts" between the defendant and the forum state such that "maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington, supra*, 326 U.S. at 316 (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This standard serves two functions: "It protects the defendant against the burdens of litigation in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

In evaluating the sufficiency of the defendant's contacts with the forum, a court must consider the "quality and nature of the activity" engaged in by the defendant. *International Shoe Co. v. Washington, supra*, 326 U.S. at 319. This may be assessed by determining whether the defendant has "purposefully availed itself" of the privilege of conducting activities within the forum, thereby invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Also, the defendant fairly must have anticipated "being haled into court" in the forum state. *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 297.

California's "long-arm" statute allows exercise of jurisdiction "on any basis not inconsistent" with the requisites of due process. Cal. Civ. Proc. Code § 410.10 (West 1973). The due process requirements are applicable to natural persons as well as corporations, *Shaffer v. Heitner*, 433 U.S. 186 (1977), and are determined by the facts and circumstances of each case. *Kulko v. California Superior Court*, 436 U.S. 84 (1978). However, in the end, a court's concept of what constitutes minimum contacts in order to assert personal jurisdiction over a non-resident will be molded to meet the needs of justice. *See Curtis Publishing Co. v. Golino*, 383 F.2d 586, 588-89 (5th Cir. 1967). Thus, it must be "reasonable" to subject a defendant to "long-arm" jurisdiction. *International Shoe Co. v. Washington, supra*, 326 U.S. at 317; *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S. at 292.

B. Appellants' Contacts with the Forum Do Not Meet "Minimum Contacts" Requirements

1. *The Quality and Nature of Appellants' Contacts Are Insufficient to Justify Imposition of Jurisdiction*

In *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957), this Court held that due process restrictions on imposing personal jurisdiction on a non-resident are more than a guaranty of immunity from distant litigation; they are a consequence of the constitutional limitation on each state's territorial powers. That is, even if the defendant faces a minimal burden of defending in a foreign forum, the defendant may not be required to do so unless there exist "minimum contacts" with that state. The minimum contacts rule, said this Court, will vary with the quality and nature of the defendant's activity, but in each case there must be "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla, supra*, 357 U.S. at 253.

Appellants contend that the actions of reporter South and editor Calder do not meet the "minimum contacts" test. That is, sporadic telephone calls by South and reading a proof of the article in question by Calder, all occurring in Florida, do not constitute a sufficient nexus to the claim alleged that the exercise of *in personam* jurisdiction by California courts would comport with the due process requirements of the Fourteenth Amendment.

In determining the sufficiency of contacts, courts consider, for example, questions of residency or bank accounts in, and telephone calls or visits to, the forum state. These same criteria apply to reporters and editors.[4] As the court below noted, neither South nor Calder ever lived in nor had bank accounts in California. *See Cox Enterprises, Inc. v. Holt*, *supra*, 678 F.2d at 939. Editor Calder did not make telephone calls to or visit California in connection with the story in question. Reporter South made a few telephone calls to California to gather information for the story and one call to invite Ingels' comment.

Other courts have held that such actions by reporters and editors do not rise to the level of "minimum contacts." For example, the court in *Cox Enterprises, Inc. v. Holt*, *supra*, 678 F.2d at 939, found no "purposeful activity" in the forum state by a reporter who did not live in nor travel to the state. Similarly, in *Church of Scientology of California v. Adams*, 584 F.2d 893, 896 (9th Cir. 1978), jurisdiction could not be imposed on non-resident reporters who had not been in the forum state "during the last fifteen years." *See also Ziegler v. Ring Publishing*, 9 Med. L. Rptr. 1303, 1304 (S.D. Fla. 1982) (jurisdiction not permitted over non-resident editor who had not been in forum "in five years"); *Gonzales v. At-*

[4] Perforce, different indicia of "minimum contacts" apply to corporations than apply to individuals. Similarly, different indicia apply to publishers than to reporters. *See, e.g.*, Cox Enterprises, Inc. v. Holt, 678 F.2d 936, 938-39, *rehearing on other grounds*, 691 F.2d 898 (11th Cir. 1982); Jones v. National Enquirer, Inc., No. C 305 009 (Cal. Super. Ct. Oct. 2, 1981) (J.A. 93).

lanta Constitution, 4 Med. L. Rptr. 2146, 2147 (N.D. Ill. 1979) (jurisdiction not permitted over non-resident reporter who had not been in forum for year and "did not telephone, write or otherwise have any contact or communication with" forum). Additionally, in a case involving real estate marketing, a California appellate court found that two letters and six or seven telephone calls into the forum were not sufficient contacts to justify the imposition of personal jurisdiction. *R. E. Sanders & Co. v. Lincoln-Richardson Enterprises, Inc.*, 108 Cal. App. 3d 71, 77-78, 166 Cal. Rptr. 269, 272-73 (1980).

On the basis of these principles, editor Calder cannot be found to have had sufficient contacts with the forum to allow personal jurisdiction to be imposed; he had no direct contacts with the state.

As the court below found, reporter South's few telephone calls also are insufficient contacts to permit "general jurisdiction" over him. J.A. 112-113. They do not rise to the level of a "presence" in the state nor do they constitute "systematic and continuous" contacts. *International Shoe Co. v. Washington*, *supra*, 326 at 158, 160. Rather, they were "irregular," *id.*, and sporadic, insufficient to allow imposition of general "long-arm" jurisdiction for the cause of action.

Also as found below, appellants did not "purposefully avail" themselves of "the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, *supra*, 357 U.S. at 253. A journalist's occasional telephone calls do not constitute "conducting activities" as this Court has used that term.[6]

Thus, the "quality and nature" of the appellants' actions do not permit imposition of personal jurisdiction by a distant forum.

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[6] This case is distinguished from cases involving minimum contacts where there were direct business dealings between plaintiff and defendant. *See, e.g.*, McGee v. International Life Insurance Co., *supra*, 335 U.S. 220.

2. *Mere Authorship of an Article Which Is Circulated by a Publication Cannot Provide a Constitutional Basis for Personal Jurisdiction*

Contrary to the position taken by the court below, it often has been held that mere authorship of an article which is circulated by a publication cannot provide a constitutional basis for *in personam* jurisdiction over the author. For example, in *Riverhouse Publishing Co. v. Porter*, 287 F. Supp. 1 (D.R.I. 1968), the court refused to find jurisdiction over financial columnist Sylvia Porter in a libel action although her column appeared on a regular weekly basis in a newspaper published in Rhode Island. The state "long-arm" statute was similar to that in California, i.e., allowing jurisdiction within constitutional limits. Noting that the column was sold by the writer to a syndicate which determined where it was to be published, the Court stated of Porter:

> From the uncontradicted facts, it must be concluded she has no contact with the State of Rhode Island. Her only connection with it is that the product of her labors—a newspaper column—appears on a syndicated basis in the Providence Journal. This constitutes an insufficient relationship with the State of Rhode Island to permit the maintenance of a suit against her in this jurisdiction.

Id. at 7. The court held that an assertion of jurisdiction over the columnist would violate due process.

Similarly, in *Church of Scientology of California v. Adams, supra*, 584 F.2d 893, the Ninth Circuit refused to find jurisdiction in California over the individual writers of an allegedly libelous article published in the *St. Louis Post Dispatch* in Missouri. Circulation of copies of the newspaper in California did not give that state jurisdiction over writers who were regular employees of the newspaper, because to do so would violate due process. Noting that the authors were "residents of Missouri," *id.* at 896, the court found that their employment by the newspaper and authorship of the pieces were insufficient

contacts to sustain jurisdiction in California where "[n]o research was done . . . and the articles were not written in that state." *Id.* at 898; *see generally Taylor v. Portland Paramount Corp.*, 383 F.2d 634 (9th Cir. 1967) (no jurisdiction over Elizabeth Taylor in Oregon notwithstanding that Twentieth Century-Fox distributed "Cleopatra" there).

A similarly overreaching assertion of jurisdiction was unequivocally rejected as a violation of due process in *Graciette v. Star Guidance, Inc.*, 66 F.R.D. 424, 427 (S.D.N.Y. 1975). There, an author

> [f]or the lump sum of $45 . . . sold outright the article upon which the California action was based, without reservation of copyright or other interest, to Star Guidance, Inc. ("Star"), a New York-based corporation, in New York City. Subsequently, Star had the article copyrighted and published it in Star's magazine, *Your Personal Astrology*, copies of which were sold in California.

Although plaintiff argued that jurisdiction attached on the ground that the author's sale of the article to the magazine was an act done with the intention of causing effects in California or at least an act which reasonably could have been expected to cause effects there since the magazine had a large national circulation, including circulation in California, the court found that:

> Merely to state this argument demonstrates its frailty and the tenuousness of defendant's relationship with California. Surely, knowledge of the magazine's circulation is not tantamount to intent to cause an effect in a specific state, especially where the defendant derived no benefits from the magazine's subsequent use of his article other than a supposed aggrandizement of his reputation and the hypothetical increased value of his works resulting therefrom.

Id. at 428. The court further found that in light of the hardship which would otherwise be imposed on the author,

it violated due process for the California court to exercise jurisdiction.

Accordingly, California cannot properly assert jurisdiction over the person of either Calder or South.

3. *Appellants' "Intent" Is Not Pertinent to the Jurisdictional Question*

In assessing whether California properly could assert jurisdiction over appellants, the Court of Appeal reviewed and rejected several grounds on which such action could be upheld, i.e., minimum contacts with the forum, " 'extensive or wide-ranging' . . . or 'substantial . . . continuous and systematic' " activities in the forum and "whether the cause of action arises out of or has a substantial connection with" appellants' activity in the forum. J.A. 112. Properly unable to find any of these theories applicable to appellants, J.A. 112-13, and admitting that "defendant Calder did not enter California or even make telephone calls into the state in connection with his role in the preparation of the subject article," J.A. 113, the Court of Appeal relied on a different standard.

The California Court of Appeal found imposition of personal jurisdiction over appellants proper based on a presumption that Calder and South "intended to cause injury to plaintiffs in California where they reside; such injury in fact occurred." J.A. 114. The court rejected the holding in *Sibley v. Superior Court*, 16 Cal. 3d 442, 446, 546 P.2d 322, 325, 128 Cal. Rptr. 34, 37 (1976), that the "mere causing of an 'effect' . . . is not necessarily sufficient to afford a constitutional basis for jurisdiction; notwithstanding this 'effect,' the imposition of jurisdiction may be unreasonable." Since appellants' conduct was "an intentional and malicious tort," reasoned the court below, causing an "effect" in the forum state was sufficient to meet due process standards. J.A. 115 (*quoting Abbot Power Corp. v. Overhead Electric Co.*, 60 Cal. App. 3d 272, 281, 131 Cal. Rptr. 508, 514 (1976)).

The common law construes "intent" in the context of torts to mean an intention to cause the consequences of an act as opposed to the intent to perform the act that leads to an injury. *See* Restatement (Second) of Torts § 8A (1965); Prosser, Law of Torts 31 (4th ed. 1971). This defines an intentional tort. As the probability of the occurrence of harm decreases to a minimal level, the actor's conduct becomes ordinary negligence, even though he still may intend to perform the act leading to the injury. Restatement (Second) of Torts § 8A at comment b; *see id.* at § 282 comment d.

The California Court of Appeal accepted without proof appellee's allegation that appellants acted with "evil motive and malice, wilfully and wrongfully with the intent to injure, disgrace and defame plaintiffs." J.A. 9. No proof of such "intent" has been adduced, nor have appellants had an opportunity to present proof to the contrary. If this Court affirms the lower court's holding that "long-arm" jurisdiction over an editor or reporter in a defamation action may be obtained solely on the unsupported ground that the journalist intended "to cause a tortious effect" or "to cause a tortious injury," J.A. 113, this Court's ruling in *Gertz v. Robert Welch, Inc., supra*, 418 U.S. 323, would be called into question. There it was held that intent cannot be presumed in defamation cases; fault is an element that must be proven by the plaintiff. *Id.* at 347. Thus, a trial would be required to prove a defendant journalist had the intent to injure the plaintiff. It is unreasonable under *International Shoe* to delay a jurisdictional decision until a decision on the merits is made.

Moreover, if this Court affirms the lower court decision it would mean that had the reporter gathered the information only in Florida and the editor edited the article in Florida, their alleged "intent" to cause harm would subject them to California's jurisdiction despite no contact at all with California by either the editor or the reporter. Certainly this would not comport with *Inter-*

national Shoe's "notions of fair play and substantial justice." An allegation and presumption of intent to injure a plaintiff through a defamation cannot be found sufficient in the face of the many cases that have held personal jurisdiction must not be imposed on out-of-state journalists without more direct contacts with the forum. *See, e.g., Cox Enterprises, Inc. v. Holt, supra*, 678 F.2d 936; *Church of Scientology of California v. Adams, supra*, 458 F.2d 893; *Ziegler v. Ring Publishing, supra*, 9 Med. L. Rptr. 1303; *Gonzales v. Atlanta Constitution, supra*, 4 Med. L. Rptr. 2146; *McBride v. Owens*, 454 F. Supp. 731 (S.D. Tex. 1978).

If the mere doing of an act, such as writing or editing of an article, is sufficient to permit imposition of personal jurisdiction by a distant forum, then there never would be a bar to "long-arm" jurisdiction in a defamation case. Every journalist who writes or edits an article intends to so write or edit.

Thus, "intent" should never be considered a criterion in determining jurisdiction in a defamation suit. If defined as meaning intent to perform the act leading to the effect, jurisdiction always can be found. If defined as meaning intent to cause the tortious effect, jurisdiction can be found only after a trial on the merits. Both of these are unreasonable under *International Shoe*. In either case, at the jurisdictional stage something more is needed—at least a finding of minimum contacts with the forum state so as to satisfy the principles of "fair play and substantial justice" required in all torts cases.

Finding that appellants "acted maliciously and with the intent to injure plaintiffs," J.A. 114, the California Court of Appeal used "intent as the sole criterion in allowing personal jurisdiction." Such a standard should not be acceptable in defamation actions. More must be required.

C. Even If Appellants' Contacts Were Sufficient, the Consequences of Imposing Personal Jurisdiction Make It Unfair and Unjust to Do So

As discussed above, a state is without authority to exercise personal jurisdiction over nonresidents unless the non-residents have had "minimum contacts" with the forum. *See World-Wide Volkswagen v. Woodson, supra,* 444 U.S. at 291-92. However, "minimum contacts" between the defendant and the forum is not a dispositive criterion. It also must be fair and reasonable to require the defendant to come into the distant state to defend the suit. *See id.* at 292; *International Shoe Co. v. Washington, supra,* 326 U.S. at 317. This Court emphatically has stated:

> Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of intrastate federalism, may sometimes act to divest the State of its power to render a valid judgment.

World-Wide Volkswagen v. Woodson, supra, 444 U.S. at 294.

Reporters and editors are exceptionally vulnerable to defamation suits.* They may be forced not only to defend themselves against defamation actions, but may face the extreme burden of doing so at great distances from their

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* One researcher found a significant increase recently in trial and appellate level defamation cases in which the defendant was a mass medium: 1977—52; 1978—79; 1979—84; 1980 (cases decided by September 30)—76. Franklin, *Suing Media for Libel: A Defamation Study*, 1981 Am. B. Found. Research J. 795, 799.

places of residence and work. As one court has said, it is important to realize that a reporter or editor may be

> subjected to a trial involving weeks or months and tremendous expense in a forum several hundred miles from his home and occupation. Conceivably this factor could become a prime consideration in a . . . decision to report and publish items critical of national figures. To hold otherwise could provide a vehicle for a plaintiff agrieved, real or imagined, to bombard the national media with litigation for no other purpose than harassment.

Westmoreland v. CBS, 8 Med. L. Rptr. 2493, 2496-97 (D.S.C. 1982). This is particularly applicable to Calder and South who, as editor and reporter on a national magazine, were sued for libel by two national figures. As the trial court below stated in relation to appellants:

> Indeed, in balancing the interests of all parties to this action, it appears that the principal practical effect of holding the individual defendants as parties to this lawsuit would be to facilitate plaintiffs' claims for punitive damages against the individuals. Such claims are asserted in addition to plaintiffs' claims for such damages against the publisher. Surely the right of a plaintiff to punish a defendant resident of a remote jurisdiction, and to receive damages beyond those necessary to compensate him for his injury should not weigh heavily on the constitutional scale of fundamental fairness.

J.A. 96-97.

Thus, if the decision below is affirmed it is likely that plaintiffs will be encouraged to pull journalists to distant forums to defend defamation actions, including those filed for harassment purposes. In light of this, as well as the fact that appellee here looks for no more than additional punitive damages from appellants, it is neither fair nor reasonable to subject appellants to personal jurisdiction in California.

II. UNDER THIS COURT'S CLASSIC HOLDINGS FOR OVER FIFTY YEARS THE ADDITIONAL FACTOR OF FIRST AMENDMENT PROTECTION FOR DISSEMINATION OF NEWS AND IDEAS PRECLUDES IMPOSING JURISDICTION OVER APPELLANTS, EVEN ASSUMING ARGUENDO THAT APPELLANTS' CONTACTS WITH THE FORUM WERE BARELY SUFFICIENT TO SATISFY THE "MINIMUM CONTACTS" TEST

A. The First Amendment's Protection of News and Information Must Be Considered in Determining Whether Imposition of Jurisdiction Over Out-Of-State Journalists Offends "Fair Play and Substantial Justice"

This Court has held for more than half a century that the First Amendment affords expression of news and political ideas a protection against state regulation greater than that available to most other activities in the private sector. As recently as this Term, the Court found violative of the First Amendment a statute imposing a special tax on newspapers: "A tax that burdens the rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 103 S. Ct. 1365, 1370-71 (1983).

That expression of news and political ideas by the media and others is entitled to greater protection from state regulation—and assertion of jurisdiction clearly is a type of regulation—than other types of activities consistently has been recognized in this Court's decisions. *See, e.g., Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Near v. Minnesota*, 283 U.S. 697 (1931). If these cases had involved activities not at the core of the First Amend-

ment, this Court would have allowed states to impose regulatory powers. It was because the activities did involve the First Amendment that this Court required the states to show a compelling state interest before regulation would be permitted.

Similarly, if appellants had been sued for committing a tort not related to freedom of expression, jurisdiction would have been proper if the "minimum contacts" test had been met and imposition of jurisdiction otherwise was fair. But here, where the alleged tort stems from a protected First Amendment activity, a higher standard than "minimum contacts" is required before personal jurisdiction may be imposed.

Holdings of this Court discussed above support the contention that a higher standard is necessary where expression is concerned. Determining the fairness of imposing jurisdiction requires balancing the nature of the activity against the nature of the contacts. Expression is a protected activity; a compelling state interest must be present to allow burdening that freedom. Bare "minimum contacts" is an insufficient criterion to show an overriding state interest in imposing personal jurisdiction on a foreign libel defendant. The standard must be a higher one.

This Court has held that in determining whether it is reasonable to subject a defendant to personal jurisdiction in a distant forum, the "burden on the defendant" and "other relevant factors" must be considered. *World-Wide Volkswagen v. Woodson, supra*, 444 U.S. at 292. Numerous courts have held that, in defamation actions brought against the media, one of those additional factors must be the First Amendment's protection of the "uninhibited, robust, and wide-open" debate on public issues. *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270.

The Court of Appeals for the Fifth Circuit was the first to apply First Amendment considerations to the law

of jurisdiction in a libel case. *Time, Inc. v. Manning*, 366 F.2d 690 (5th Cir. 1966); *Buckley v. New York Times Co.*, 338 F.2d 470 (5th Cir. 1964); *Walker v. Savell*, 335 F.2d 536 (5th Cir. 1964). Relying on *Buckley*, the court in *New York Times Co. v. Connor*, 365 F.2d 567, 572 (5th Cir. 1966), stated that "First Amendment considerations surrounding the law of libel require a greater showing of contact to satisfy the due process clause than is necessary in asserting jurisdiction over other types of tortious activity."

Since *Connor*, courts have used various phrases to describe the impact of the First Amendment in deciding jurisdictional questions. The Court of Appeals for the Fifth Circuit, for example, has said that "First Amendment considerations are a significant factor to be weighed." *Edwards v. Associated Press*, 512 F.2d 258, 266 (5th Cir. 1975). The Eleventh Circuit has said that "jurisdiction is subject to First Amendment considerations when a non-resident publisher is sued for libel." *Cox Enterprises, Inc., v. Holt, supra*, 678 F.2d at 937. A federal district court found that the First Amendment element "tilts the scales decisively" in favor of a defendant publisher. *McCabe v. Kevin Jenkins and Associates, Inc.*, 531 F. Supp. 648, 654 (E.D. Pa. 1982). Judge Medina of the Second Circuit has said, "I am not shocked to see the principles embedded in the First Amendment applied to the expanding subject of jurisdiction over the person." *Buckley v. New York Post Corp.*, 373 F.2d 175, 184 (2d Cir. 1967) (Medina, J., concurring). Thus, courts agree that the First Amendment is one of the "relevant factors" that must be considered in determining whether imposition of personal jurisdiction over non-resident journalists in a defamation case comports with due process requirements.[7]

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[7] *See* Comment of Judicial Council to Cal. Civ. Proc. § 410.10, "Bases of Judicial Jurisdiction Over Individuals," at 9:

> Some actions, such as defamation, affect interests of a defendant that are protected by the First Amendment of the United

Such a rule must be applied in this case. Courts should be required to weigh any relevant First Amendment interests in determining whether the assertion of personal jurisdiction over a non-resident journalist in a defamation action is fair and reasonable. This approach has been adopted in the majority of jurisdictions that have considered the issue.[8]

A few courts have failed to appreciate the nature of the First Amendment policy interests present in these types of cases. *See, e.g., Anselmi v. Denver Post, Inc., supra,* 552 F.2d 316. Most lower courts, however, have developed the doctrine of weighing First Amendment considerations in determining jurisdiction because the very act of asserting jurisdiction may cause a chilling effect. Controversial stories may be watered down or withdrawn based on the specter of defending a libel suit in a remote jurisdiction. It therefore is desirable and consistent with

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States Constitution. For a state to have judicial jurisdiction over such action, it may be that the defendant must have a closer relationship to the state, or have caused effects of a more substantial nature in the state, than would otherwise be required.

The Court below failed to consider this language.

[8] *See* Cox Enterprises, Inc. v. Holt, *supra*, 678 F.2d at 937-38; Edwards v. Associated Press, *supra*, 512 F.2d at 266; Rebozzo v. Washington Post Co., 515 F.2d 1208, 1214-15 (5th Cir. 1975); Curtis Publishing Co. v. Golino, *supra*, 383 F.2d at 592; New York Times Co. v. Connor, *supra*, 365 F.2d at 572; Time, Inc. v. Manning, *supra*, 366 F.2d at 695; Walker v. Savell, *supra*, 335 F.2d at 544; McCabe v. Kevin Jenkins and Associates, Inc., *supra*, 531 F. Supp. at 654-55; Burlotos v. News, 6 Med. L. Rptr. 1986, 1988 (D.N.J. 1980); Gonzales v. Atlanta Constitution, *supra*, 4 Med. L. Rptr. at 2148; McBride v. Owens, *supra*, 454 F. Supp. at 735; Margoles v. Johns, 333 F. Supp. 942, 946 (D.D.C. 1971), *aff'd*, 438 F.2d 1212 (D.C. Cir. 1973); Johnston v. Time, Inc., 321 F. Supp. 837, 846-47 (M.D.N.C. 1970); Bradlee Management Services v. Cassells, 249 Ga. 717, 292 S.E.2d 717, 720 (1982); *but see* Anselmi v. Denver Post, Inc., 552 F.2d 316, 324 (10th Cir.), *cert. denied sub nom.* Times Mirror Co. v. Anselmi, 432 U.S. 911 (1977).

Gertz to assess the First Amendment interests *before* trial, rather than at trial.

This approach is consistent with established doctrine that First Amendment interests must be considered before the protected interests are abridged. *See, e.g., Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Consideration of these interests is required even if ultimately it is determined that they will not prevail in a given case. *See Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Herbert v. Lando*, 441 U.S. 153 (1979).

B. Imposition By Distant States of Jurisdiction over Reporters and Editors Will Have a Deleterious Effect on the Dissemination of News and Public Affairs Information

If First Amendment interests are considered in this case, it is clear that the danger created in exposing appellants to potential liability far outweighs California's incidental interest in asserting jurisdiction. Strong First Amendment interests militate against the exercise of jurisdiction over appellants. If the California Court of Appeal decision is affirmed, reporters and editors may hesitate risking the preparation of controversial articles arising from or even concerning persons in distant jurisdictions. Likewise, reporters and editors actually may be discouraged from presenting fair and balanced stories if the price of such "balance" is submission to a distant state's jurisdiction.

This Court has encouraged journalists to report matters of public interest so that there will be an "uninhibited, robust, and wide-open" debate on important issues. *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270. To do this, journalists must feel free to research thoroughly. If an article is to contain information necessarily generated outside the state of publication, a journalist must at least have the ability to sporadically telephone and occasionally travel to distant states so long as a "presence"

under *International Shoe* is not established. Certainly reporters will be hesitant to take these steps if they know such information gathering procedures will require them to defend defamation actions—including nuisance suits—in distant forums. Instead, they may rely on information they can gather locally. The journalist may not doubt the accuracy of this limited information. However, contact with out-of-state sources might provide additional, more complete, even contradictory information.

Also, a journalist who believes information for a possibly controversial story can be gathered *only* out-of-state may elect not to write the story. Weighing the possibility of being haled into court in a distant state against writing a controversial story, the reporter may well choose to write about a different, less important and more local subject. A reporter or editor does not attain direct or financial gain from writing a controversial story. Even if the publication achieves a greater circulation because of the story, the journalist obtains no direct reward. Thus, there is nothing to counterbalance the risk of facing prolonged litigation in a distant state.

Whether the journalist does not write the story at all or writes it based on limited information, the flow of news to the public is impeded. When a reporter fears the consequences of making an out-of-state telephone call to obtain or to confirm information, the First Amendment's vitality is in serious question.[9]

The number of defamation actions is rising dramatically each year. The fear of defending oneself in a distant court is felt by journalists on small media as well as

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[9] Reflecting on New York Times Co. v. Connor, *supra*, 365 F.2d 567, one commentator wrote: "There is, too, the need to be careful that the movement of ideas across the nation is not inhibited by threat of distant libel actions." Weinstein, *Trends in Civil Practice*, 62 Col. L. Rev. 1431, 1436 (1962). This is no less true twenty years later.

reporters and editors working for metropolitan media and national news gathering organizations.

Amici do not suggest that journalists should be immune from defamation actions. Rather, *amici* contend that occasional news gathering activities should not be considered sufficient contacts to allow imposition of personal jurisdiction in a distant forum.[10] Where the defendant's actions are speech-related, the First Amendment must be a factor in determining whether jurisdiction comports with due process.

The decision in this case of first impression in this Court will establish policy to be followed by all jurisdictions and will affect all mass media. However, appellants' employer, the *National Enquirer*, with its circulation of over 5 million, J.A. 37-43, is not typical of the country's media. While *amici* contend that on several legal grounds appellants should not be subject to California's "long-arm" jurisdiction, it may be that a national publication such as the *Enquirer* can afford the costs of sending its editor and a reporter 3,000 miles for several months to defend a libel action. The majority of the media outlets in this country cannot do this without suffering debilitating financial losses.[11] However, the *Enquirer*, like most other large and small news organizations, would find the loss of key editorial personnel severely disruptive of its news operations.

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[10] For example, a foreign mass medium or news gathering organization maintaining an office and news correspondents in Washington, D.C., for the gathering of news is not "doing business" for the purpose of service of process on one of its reporters. *See* Bulletin Co. v. Origoni, 387 F.2d 240, *cert. denied*, 389 U.S. 928 (1967); Margoles v. Johns, *supra*, 333 F. Supp. at 946.

[11] While for some print and broadcast media a portion of the expense connected with defending against a defamation action may be covered by insurance, many smaller outlets cannot afford to carry libel insurance.

Nearly 11,000 magazines are published in this country, many with small circulations. IMS Ayer Directory of Publications viii (1983). There are approximately 1,700 daily newspapers in the United States, ranging from those with circulations of a few thousand to those with over 1 million circulation. *Id.* Additionally, there are almost 7,500 weekly and semi-weekly newspapers, *id.*, most with limited circulations and small financial bases. Many weeklies are family-owned and operated; many small dailies and magazines are not owned by large corporations. Defending against defamation actions locally would be injurious to these smaller publications. But the time, expense and loss of key editorial personnel involved when editors or reporters are "haled" into a *distant* court —perhaps on the basis of a few phone calls or an occasional news gathering trip—might put the publication out of business. For editors and reporters on a smaller publication, successfully defending against a defamation suit in a distant state might be a Pyrrhic victory—there would be no publication to which to return.

Large television and radio stations are situated like large newspapers and magazines, generally able to withstand the financial drain of sending editorial personnel to defend defamation suits in distant states. But many of the country's almost 1,300 television stations and more than 9,200 radio stations, *Broadcasting*, May 23, 1983, at 87, are smaller operations, located outside major metropolitan areas. They face the same problems as do smaller print media from imposition of jurisdiction over their personnel by distant states.

Different, but just as serious, problems are faced by many editors and reporters employed by large, nationally circulated newspapers and magazines and by news gathering organizations such as Associated Press. These journalists constantly report on and edit stories about events

occurring throughout the country. They do not have the choice to cover more local stories; it is their job to deal with national events. Thus, under the theory of the California Court of Appeal, they constantly will be subject to being sent from coast to coast and border to border to defend against defamation suits brought in states far away from their places of work and residence and far from their employers' bases of operation.

Affirming the decision of the California Court of Appeal could have a devastating impact on the news and public affairs coverage by the thousands of media outlets in this country. Reporters and editors may choose to cover less controversial stories, may hesitate to make news gathering phone calls or trips to distant states and may be reluctant to write stories other than those based on information gathered locally. This self-censorship, prompted by fear of reprisals, should not be sanctioned by this Court.

CONCLUSION

For the above-stated reasons, the decision of the California Court of Appeal should be reversed.

Respectfully submitted,

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June 13, 1983

BY HAND

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Re: *Calder v. Jones*
No. 82-1401

Dear Mr. Clark:

Appellants consent to the filing of a brief *amicus curiae* by the organizations whom you represent.

Sincerely

/s/ John G. Kester
JOHN G. KESTER

APPENDIX B

LAW OFFICES
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May 25, 1983

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Re: *Jones v. Calder, No. 82-1401*

Dear Mr. Landau,

We have determined not to stipulate to your request to file a Brief Amicus Curiae in the above captioned appeal. Accordingly, you should make the appropriate motion to the Supreme Court for permission to file your brief.

Our reason for opposing your request is that your previous amicus brief was essentially a rehash of the arguments presented by Williams & Connolly which offered the Court neither guidance nor insight into the issues before it. In addition, your prior brief in the *Jones v. Calder* matter was filed at the last minute making it impossible for Appellees to respond despite your opportunity to file it at an earlier time in order to permit such a response.

Very truly yours,

/s/ Richard P. Towne
RICHARD P. TOWNE

RPT: csg